

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
On Brief June 18, 2008

DOUGLAS V. KILLINS v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Montgomery County
No. 40200141 Michael R. Jones, Judge**

No. M2007-02086-CCA-R3-PC - Filed November 5, 2008

Petitioner, Douglas V. Killins, was convicted of second degree murder by a Montgomery County jury. *State v. Douglas V. Killins*, No M2004-00341-CCA-R3-CD, 2005 WL 94422, at *1 (Tenn. Crim. App., at Nashville, Jan. 13, 2005), *perm. app. denied* (Tenn. May 2, 2005). The trial court sentenced Petitioner to thirty-eight years to be served as a Range II multiple offender. *Id.* Petitioner unsuccessfully appealed his conviction to this Court. *Id.* Petitioner subsequently filed a petition for post-conviction relief arguing that trial counsel provided ineffective assistance of counsel. Petitioner specifically argued that trial counsel was ineffective in not utilizing Petitioner's history of mental illness at trial. Following an evidentiary hearing, the post-conviction court denied the petition. Petitioner appealed to this Court. After a thorough review of the record, we conclude that trial counsel was not ineffective in failing to present Petitioner's history of mental illness to the trier of fact. Therefore, we affirm the decision of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Sheri S. Phillips, Clarksville, Tennessee, for the appellant, Douglas V. Killins.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; John Carney, District Attorney General, and Art Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts were summarized on direct appeal as follows:

Ms. Mary Moseley, a thirty-three year old mother of four, was stabbed twenty-three times with a knife in the late evening hours of February 11, 2002, in the back yard of the Defendant's home in Clarksville. Officer Brant Reed, the first responder to the scene, testified that he found the victim lying on her stomach with her head turned to the side, her mouth half open, and her eyes glazed over. When he asked her what happened, she moved her mouth but no audible response could be heard. Officer Reed lifted the back of the victim's shirt and observed multiple stab wounds. Shortly thereafter the victim was transported to a local hospital by emergency medical personnel, but was pronounced dead on arrival.

The Defendant was indicted by a Montgomery County grand jury in March of 2002 for first degree murder. *See* Tenn. Code Ann. § 39-13-202(a)(1). A jury trial was held in February of 2003. At trial, the evidence revealed that the victim had been dating the Defendant, and they were together in the back yard of the Defendant's house the night of the crime, smoking crack cocaine. An argument broke out and escalated to a struggle, which ultimately involved a knife with a three to four inch blade, and ended in the victim's death.

Ms. Lakesha Kill[i]ns, the Defendant's niece, testified that she lived in the house with the Defendant and several other family members. On the night of the murder she heard talking, got out of bed to investigate, and was told by her uncle, Mr. Bert Mayo, to call 911, which she did. Mr. Mayo, the Defendant's brother, testified that he observed the victim smoking crack earlier on the night of the murder. He further testified that he was in his room later that night when for some reason he felt compelled to go look outside the house, and upon doing so he observed someone lying on the ground. He testified that he approached the victim and heard her say "evidently I must have pushed [the Defendant] too far." Mr. Mayo also stated that after instructing his niece to call 911, he told the Defendant to leave until things could calm down. Mr. Mayo added that in the past he had observed the victim with a small pocket knife, which she used to cut up rocks of crack cocaine; that the victim often became violent when she was on crack; and that "she brung it on herself." The victim's sister, Debra Moody, testified that the victim did not use drugs, and never carried a knife.

Officer Reed testified that when he arrived on the scene the victim's jacket was up around her "head, neck, shoulder area." The State presented forensic evidence demonstrating that blood found on the clothes the Defendant was wearing

when he surrendered to police the night of the murder belonged to the victim. Additionally, scrapings from under the victim's fingernails contained the Defendant's DNA. Dr. Thomas Deering, who performed the autopsy on the victim, testified that the victim had been drinking and ingesting cocaine shortly before her death. He also testified that the victim had a total of twenty-three knife wounds, including wounds that punctured her lung and severed her subclavian vein. The bulk of the stab wounds formed a pattern across the victims['s] chest and were inflicted in what Dr. Deering described as a "rapid fire" manner. He estimated the victim bled to death "quickly," which he described as less than fifteen minutes. He also testified that the punctures in the victim's jacket suggest it had been pulled over her head during much of the stabbing, which also accounted for the relatively few defensive wounds found on the victim.

At trial the Defendant testified that he and the victim had been smoking crack cocaine for some time that night, but ran out. He was tired and wanted to retire for the evening, but stated the victim wanted more cocaine and demanded that he go out and rob someone to obtain funds for purchasing more drugs. When he refused to comply with her request, the Defendant testified that she became "wild," began screaming, grabbed her pocket knife and "came at me." The Defendant further testified that he managed to take the knife away from her, but she still attacked him, scratching at his eyes. He said he was therefore forced to stab her in defense. The Defendant stated that she continued to attack him and he continued to stab her with the knife until "she stopped struggling."

The Defendant also testified that he had several physical impairments, some the result of multiple fights while incarcerated; that the victim was bigger than he was; and that he feared for his life as he struggled with the victim. The Defendant further stated that he didn't think his stabs would kill her as the knife was "small" and the victim was "fat." Near the conclusion of his testimony, when questioned by the State as to why he did not use less force to defend himself from the victim's alleged attack, the Defendant stated that he "flipped out," and "lost it."

At the conclusion of the trial, the judge instructed the jury on the indicted offense of first degree murder and lesser-included offenses, as well as self-defense. The jury returned a verdict of guilty on the lesser-included offense of second degree murder. *See* Tenn. Code Ann. § 39-13-210.

A sentencing hearing was held in April of 2003, at the conclusion of which the Defendant was sentenced to thirty-eight years in the Department of Correction as a Range II multiple offender for his convicted offense of "second degree murder." The trial court found that the Defendant had a previous history of criminal convictions beyond those necessary to establish his appropriate range; he had a history of noncompliance with community release; he used a deadly weapon in the

commission of the crime; and the felony was committed while the Defendant was on the release status of probation from a prior felony conviction. Based on these factors, the trial court enhanced the Defendant's sentence from the presumptive mid-point of thirty-two and a half years to thirty-eight years.

State v. Douglas V. Killins, No M2004-00341-CCA-R3-CD, 2005 WL 94422, at *1-2 (Tenn. Crim. App., at Nashville, Jan. 13, 2005), *perm. app. denied* (Tenn. May 2, 2005).

Post-conviction Hearing

On January 23, 2006, Petitioner filed a pro se petition for post-conviction relief claiming ineffective assistance of counsel. On February 21, 2006, an amended petition was filed. The post-conviction court held a hearing on July 31, 2007.

Dr. Rokeyn Farooque, with the Middle Tennessee Mental Health Institute ("MTMHI"), was the first witness at the hearing. Dr. Farooque testified that she completed an in-patient forensic evaluation on the petitioner on August 27, 2002. Petitioner was discharged back to the jail on September 18, 2002. However, Dr. Farooque stated that she had also treated Petitioner in April of 1987 when he was in jail for armed robbery. On that occasion, Petitioner had attempted to hang himself while he was in jail. In 1987, Dr. Farooque diagnosed Petitioner with major depressive disorder with psychotic features. Dr. Farooque testified that Petitioner had also been subject to prior psychiatric treatment at the Harriet Cohn Center in 1996. In 1996, Petitioner was diagnosed with Axis I Paranoid Schizophrenia. Upon Dr. Farooque's treatment of Petitioner in August of 2002, she diagnosed him with paranoid schizophrenia at that time. Petitioner informed her that he had ceased taking his medication for his schizophrenia in December of 2001. Throughout his stay at MTMHI, Petitioner was treated with medication. Petitioner had auditory hallucinations, i.e., hearing voices, but the hallucinations continually lessened during his treatment. Petitioner was still hearing voices at the time of his return to jail, but Dr. Farooque recorded during her evaluation that Petitioner was doing well and responding well to his medication and had moderate symptomology at that time. During his evaluation, Petitioner maintained that he was innocent of the crime.

Dr. Farooque's focus during the evaluation was upon whether Petitioner was sane the day the crime occurred. She testified that she was familiar with the legal standards for insanity and incompetence. During the time of his evaluation, he struck one patient, but his depression did decrease. As far as hearing voices, he was only hearing them at night. Dr. Farooque partially relied upon a social worker's interview with Petitioner's mother. Petitioner's mother told the social worker that Petitioner did not demonstrate any features of mental illness at the time of the crime. The mother stated that she thought he was doing fine and that he was not "acting crazy." Petitioner described the evening in question by stating that he and the victim were drinking and doing cocaine and she went to pick up her son. He never stated during his evaluation that he believed the victim was trying to kill him. At the conclusion of her evaluation, Dr. Farooque concluded and opined that Petitioner did not have any basis for a defense of insanity. She also stated that he was competent to

stand trial at the time they discharged him. Dr. Farooque stated at the hearing that she stood by her conclusions during the evaluation.

Petitioner's brother, Michael Mayo, also testified at the post-conviction hearing. At the time of the incident, Mr. Mayo saw Petitioner almost every day at their mother's house. Petitioner lived with his mother. On the day of the murder, Mr. Mayo saw Petitioner at his mother's house, and he described Petitioner as being "out of it" that day. He also stated that Petitioner had been that way for a while.

Petitioner testified at the hearing. Petitioner stated that he told trial counsel what had happened the night of the murder and that he is paranoid schizophrenic. According to Petitioner, when he went to MTMHI, trial counsel told Petitioner not to say anything to anyone there because "they might use it against [him]." Petitioner testified that he did not tell the truth about what happened because trial counsel told him not to talk to anyone about the incident. Petitioner was not taking his medication for his paranoid schizophrenia diagnosis at that time. Petitioner testified that on the night of the murder he felt "disordered" and that he thought the victim was going to kill him.

Trial counsel was the final witness at the post-conviction hearing. Trial counsel stated that he had represented Petitioner on an especially aggravated robbery charge before he represented him on the murder charge in question. Trial counsel was able to get the charges dismissed on the aggravated robbery. He did not recall ordering a forensic psychological evaluation at that time. Trial counsel was appointed to represent Petitioner on the murder charge. Petitioner told trial counsel that he did not commit the crime but instead arrived after the victim had been stabbed. Petitioner told trial counsel that he tried to assist the victim and he got blood on his clothing while trying to pick her up and that she scratched his face while "she was in the throws of death." Trial counsel obtained a forensic evaluation order because he became aware of Petitioner's mental health history. Trial counsel wanted to determine whether Petitioner's mental health history could be part of a viable defense. Trial counsel received a letter from MTMHI which stated that Petitioner was not insane and that he was competent to stand trial. Trial counsel subsequently called MTMHI and spoke with Dr. Craddock who was a member of Petitioner's treatment team. Trial counsel posited several hypotheticals to determine whether there would be any hope of an insanity defense. Dr. Craddock informed trial counsel that other people the MTMHI staff spoke with said that Petitioner had not been acting as if he was having a psychotic episode at the time of the crime.

Trial counsel also stated that Petitioner had maintained that he had not committed the murder. This statement was consistent with what Petitioner told the staff at MTMHI. Trial counsel did not recall telling Petitioner to not tell anyone about the crime. He testified that it was his standard practice to tell his clients not to speak with other inmates about their case to prevent other inmates from offering information in exchange for a deal. Trial counsel also stated that if Petitioner interpreted his instructions in such a manner as to mislead the staff at MTMHI, then it was not intended. Trial counsel spoke with the medical examiner who informed trial counsel that there were twenty-two penetrating stab wounds as well as numerous "foot marks" which could have been the result of Petitioner getting "tired while he was sitting on top of her and maybe rested the knife on

her[.]” Sometime prior to trial, Petitioner changed the story he provided trial counsel. Petitioner later maintained that the victim attacked him with the knife, he got the knife away from her, but continued to stab her because she was still attacking him. Trial counsel found this recitation of the facts to be consistent with the evidence provided at trial and matched either voluntary manslaughter or a self-defense claim. Trial counsel did have ex parte funds for an investigator. Trial counsel was trying to determine whether Petitioner should testify. There was DNA evidence linking Petitioner to the stabbing, as well as a recording by the first responder’s car camera of Burt Mayo stating that “it was my brother and they got in to it” Trial counsel believed that the evidence was overwhelming and that if Petitioner did not testify at trial he was looking at a first degree murder conviction. At the conclusion of the trial, the jury convicted Petitioner of second degree murder.

On cross-examination, trial counsel stated that he believed that Petitioner understood him, despite Petitioner’s low intellect. Trial counsel stated that Petitioner’s responses were always appropriate and he did not seem “spaced out.” Trial counsel stated that he thought he and Petitioner had a “pretty good rapport.” Trial counsel did realize that Petitioner had a history of mental illness, but he could not remember if it was from his representation of Petitioner on the first charge or the current charge. Trial counsel testified that it is standard practice to request a psychological evaluation in any homicide case. Trial counsel stated that he did not do any independent research as to the symptoms of schizophrenia. Trial counsel specifically stated that he relied upon the trained psychiatrist who completed the evaluation and who was familiar with Petitioner’s records regarding his mental health history. Petitioner initially maintained that he was not present when the stabbing occurred. Later, when he admitted being present, Petitioner still did not state that he had heard voices or had hallucinations or anything of that nature. Trial counsel denied that the paranoid schizophrenic diagnosis would have helped with a self-defense claim because the victim outweighed Petitioner by forty pounds, she was high on cocaine, and Petitioner was in bad physical shape because he had been stabbed before. Trial counsel reiterated that Petitioner had never made a statement about any symptoms to bring out the mental health issue. The night before he was to testify at trial, Petitioner admitted to trial counsel that he had stabbed the victim. At that point, trial counsel testified that he did not have the opportunity to launch a psychiatric defense, nor did he feel that he needed to based upon Petitioner’s recitation of the facts.

On August 28, 2007, the post-conviction court filed a written order denying the petition. This order stated in part:

Did [trial counsel] provide ineffective assistance of counsel?

The court is unable to find by clear and convincing evidence or by any standard that [trial counsel] failed to provide effective assistance of counsel. The claim of self-defense was presented to the jury. [Petitioner’s] version of the facts was presented to the jury. [Petitioner] did not represent at the trial or at the post conviction hearing that he was suffering from any delusions or paranoia in reference to the killing. The court is taking judicial notice of the court file and in particular the

charge of the jury. The charge of the jury included self-defense. The charge specifically included the language as follows: “the danger creating the belief of imminent death must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds.” The jury weighed the evidence as presented. There has been no additional evidence presented that was not presented to the jury. The court finds that [trial counsel] did provide effective assistance of counsel. After the testimony of the medical examiner, the court believes that a finding of first-degree murder could have been sustained. The court believes that the testimony of the medical examiner likewise destroyed any theory of self-defense.

[Petitioner] also alleged that the failure to present the mental health issue had an effect on the intent issue. Based on the definition of seconding [sic] degree murder being a “knowing killing of another,” the court finds that the failure to present any mental health issue could not possibly have affected the verdict considering the testimony of the medical examiner. There could be no prejudice whatsoever in that respect.

[Petitioner] also alleged that the failure to present mental health evidence was ineffective assistance of counsel as it related to voluntary manslaughter. Voluntary manslaughter is defined as a knowing killing of another and that the killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. The jury had overwhelming evidence that [Petitioner] stabbed the victim many times. The jury had the information that [Petitioner] claimed that the victim had the knife originally. The jury had the proper jury instructions. The Petitioner has failed to present any evidence that would lead a “reasonable person” to act in an irrational manner. The court cannot find that the failure to prove mental health issue would have changed the verdict of the jury.

[Trial counsel] took a set of facts that could have resulted in a first-degree conviction. Through his efforts, his client was convicted of second-degree murder. This court finds that in all respects [trial counsel] provided effective assistance of counsel.

Petitioner filed a timely notice of appeal to this Court.

ANALYSIS

Standard of Review

The post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review

of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

On appeal, Petitioner argues that his trial counsel was ineffective in failing to present Petitioner's mental disease or defect to the jury so that he could show that Petitioner could not form the requisite intent for first or second degree murder due to diminished capacity. He also asserts that trial counsel was ineffective because he did not adequately explain to Petitioner the importance of the psychological evaluation that he was to undergo prior to trial. When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, Petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, Petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that the issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins*, 911 S.W.2d at 347. This Court may not second-guess a reasonably based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Diminished Capacity Defense

Petitioner argues that trial counsel's representation was ineffective because he should have presented a defense of diminished capacity based upon Petitioner's paranoid schizophrenia diagnosis. Petitioner specifically argues that his mental illness would have negated the mental state required to commit either first or second degree murder or manslaughter and that trial counsel should have presented Petitioner's history of mental illness to the jury.

As stated above, the post-conviction court's factual findings are conclusive unless the evidence preponderates otherwise. With regard to this issue, the post-conviction court found that the medical examiner's testimony would not negate the mental state required for first or second degree murder, and manslaughter. This conclusion is supported by Dr. Farooque's testimony at the hearing. She testified that she stood by her conclusion that Petitioner was legally sane at the time of the murder and was competent to stand trial. During the evaluation, Dr. Farooque had a social worker interview Petitioner's mother who stated that Petitioner seemed fine at the time of the murder.

To be successful on a claim of ineffective assistance of counsel Petitioner must prove that trial counsel was ineffective and that it affected the outcome of the trial. Trial counsel in this case obtained a mental evaluation for Petitioner. The results of the evaluation were that Petitioner did not have an insanity defense and was competent to stand trial. Trial counsel also spoke with Dr. Craddock, one of the doctors who completed the evaluation. When presented with various hypotheticals, Dr. Craddock led trial counsel to conclude that there was no hope of a defense based upon Petitioner's mental illness. We conclude that counsel did not afford Petitioner ineffective assistance of counsel.

Even if this Court had determined that trial counsel's representation was ineffective, Petitioner would be unable to prove that the outcome of the trial would have been different. At the hearing, Dr. Farooque was very clear in her support of her earlier conclusion. She specifically stated that she stood by her earlier conclusion that Petitioner was not insane and was competent to stand trial. We conclude that this testimony by a medical professional would not have led a reasonable trier of fact to conclude that Petitioner was not capable of forming the requisite intent.

Therefore, we conclude that the evidence does not preponderate against the post-conviction court's findings of fact, and Petitioner cannot prove either that trial counsel's representation was deficient or that the outcome of the trial would have been different had the representation been deficient.

Explaining the Psychological Evaluation to Petitioner

Petitioner argues that his trial counsel was ineffective because trial counsel told him not to speak to anyone about the events of the night in question. Petitioner testified at the post-conviction hearing that he lied during his psychological evaluation because of advice given to him by trial

counsel. Trial counsel stated that he may have told Petitioner not to speak with other patients or prisoners about the incident, but trial counsel did not intend for him to not speak with any individuals evaluating him.

We conclude that trial counsel's representation was not ineffective. Petitioner has not proven that trial counsel's representation was deficient or that the outcome at trial would have been any different. Initially, we note that telling a defendant not to speak with other inmates regarding specific facts of the crime with which they are accused is very reasonable advice. Trial counsel stated that up until the night before trial, Petitioner maintained that he had not stabbed the victim. According to Dr. Farooque, Petitioner maintained during his evaluation that he did not kill the victim. Therefore, Petitioner's story to the staff at MTMHI was no different than that to trial counsel.

In addition, trial counsel testified that Petitioner responded appropriately to all requests, and it appeared as if Petitioner understood him. Trial counsel did not have any reason to conclude that Petitioner did not understand him.

Although attorneys representing criminal defendants with a history of mental disorders as extensive as Petitioner's should always examine the medical records documenting those disorders, Petitioner has not proven that there is reasonable probability that the outcome of his trial would have been any different. Dr. Farooque concluded, even without Petitioner admitting that he committed the crime, that Petitioner was both competent to stand trial and was not so mentally ill so that he could mount a defense based upon his illness. Petitioner has presented no evidence to show that admitting to the stabbing of the victim would lead to a conclusion that he was legally insane for purposes of not being competent to stand trial or mounting a defense to the charges. In addition, Petitioner maintained up until the night before trial to both MTMHI staff and trial counsel that he had not killed the victim.

Petitioner has failed to show that trial counsel's representation was deficient or that the outcome of the trial would have been any different had trial counsel's representation been deficient.

CONCLUSION

For the foregoing reasons, we affirm the denial of the petition for post-conviction relief.

JERRY L. SMITH, JUDGE